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MOONRACER, INC. d/b/a SYNAPTIS

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IT CONVERGENCE, a California corporation,

Case No. 3:13-cv-04467-NC

Plaintiff,

V.

MOONRACER, INC. d/b/a SYNAPTIS, a North Carolina corporation, and DOES 1-10, inclusive,

**DEFENDANT MOONRACER, INC.'S
NOTICE OF MOTION AND MOTION FOR
JUDGMENT ON THE PLEADINGS, OR,
ALTERNATIVELY, A STAY;**

**DEFENDANT MOONRACER, INC.'S
STATEMENT IN SUPPORT OF NOTICE
OF PENDENCY OF OTHER ACTION OR
PROCEEDING PER L.R. 3-13(C);**

MEMORANDUM OF POINTS AND AUTHORITIES

Date: November 20, 2013
Time: 1:00 p.m.
Judge: Hon. Nathaniel Cousins
Courtroom: Courtroom A, 15th Floor

Complaint Filed: August 23, 2013
Trial Date: None Set
Judge: Hon. Nathaniel Cousins

1 **NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS, OR,**
2 **ALTERNATIVELY, A STAY OF PROCEEDINGS**

3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE that on November 20, 2013 at 1:00 p.m., or as soon as this
5 matter may be heard in the Courtroom A of the Honorable Nathaniel Cousins of the above-
6 referenced Court, Defendant Moonracer, Inc. d/b/a Synaptis (“Defendant” or “Moonracer”)
7 respectfully moves the Court, under Rule 12(c) of the Federal Rules of Civil Procedure, for
8 judgment on the pleadings or, alternatively, for a stay of the instant case, *IT Convergence v.*
9 *Moonracer*. The basis for this Motion is that this action pertains to identical factual and legal
10 issues, and substantially the same parties, as the following action currently pending in the United
11 States District Court for the Western District of North Carolina: *Moonracer, Inc. d/b/a Synaptis*
12 *v. Jordan N. Collard*, Case No. 5:13-cv-00455-BO (W.D. N.C.) (the “North Carolina Action”).
13 The essential dispute in that case is the same as the essential dispute in this case: whether the
14 employment of Mr. Jordan N. Collard, a former employee of Moonracer, violates the terms of a
15 contract between Moonracer and Mr. Collard.

16 Accordingly, Moonracer requests that this action be dismissed, with prejudice.
17 Alternatively, Moonracer requests this Court to exercise its authority and discretion to stay this
18 action pending the resolution of the North Carolina Federal Action (and, if remanded, the North
19 Carolina State Action, to avoid duplicative litigation.

20 This motion is based on this Notice, the supporting Memorandum of Points and
21 Authorities, the Proposed Order, the Request for Judicial Notice and exhibits thereto, all
22 pleadings, records and papers on file in this action, the North Carolina State Action, and the
23 North Carolina Federal Action, and such further evidence and argument as may be presented to
24 the Court at the hearing of this motion.

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1 **STATEMENT BY DEFENDANT MOONRACER, INC. IN SUPPORT OF NOTICE OF**
2 **PENDENCY OF OTHER ACTION OR PROCEEDING PER L.R. 3-13(C)**

3 On September 26, 2013, in conjunction with its filing of a Notice of Removal to this
4 Court, Defendant Moonracer, Inc. (“Moonracer”) filed a Notice of Pendency of Other Action
5 Pursuant to Local Rule 3-13. Pursuant to Rule 3-13(d) of the Local Rules of the Northern
6 District of California, Moonracer submits this statement in support of its Notice of Pendency of
7 Other Action Pursuant to Local Rule 3-13. As its statement in that regard, Moonracer refers the
8 Court to the Memorandum of Points and Authorities, set forth below, in support of its
9 accompanying Motion for Judgment on the Pleadings, or, Alternatively, a Stay.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTION AND FACTUAL SUMMARY**

3 On May 23, 2013, Defendant Moonracer, Inc. (“Moonracer”) commenced an action in the
 4 Superior Court of Wake County, North Carolina against Jordan N. Collard (“Mr. Collard”), a
 5 present employee of Plaintiff IT Convergence and a former employee of Defendant Moonracer,
 6 Inc. (the “North Carolina State Action”). Request for Judicial Notice (“RJN”), Exhibit A
 7 (Complaint in North Carolina State Action).

8 The North Carolina State Action is related to and arises out of the same facts and
 9 circumstances as this action does. In the North Carolina State Action, Moonracer alleges that
 10 Mr. Collard, as an employee of IT Convergence, is currently violating a non-competition
 11 agreement that he signed while employed by Moonracer, Inc., and seeks to prevent Mr. Collard
 12 from doing so. *See* RJN, Exhibit A at ¶¶ 7-26. In this action, which was filed later on August 23,
 13 2013, IT Convergence alleges that the agreement is not enforceable and that by seeking to
 14 enforce it, Moonracer, Inc. is interfering with the IT Convergence’s receiving the benefit of Mr.
 15 Collard’s services. *See* Document No. 001-01 (Complaint in this Action, filed on September 26,
 16 2013 as Exhibit A to Notice of Removal by Moonracer) at ¶¶ 12-28, 45, 60, 64. After the North
 17 Carolina State Action was filed by Moonracer, Mr. Collard removed that action to the United
 18 States District Court for the Eastern District of North Carolina. RJN, Exhibit B. The removed
 19 action is entitled *Moonracer, Inc. d/b/a Synaptis v. Jordan N. Collard*, U.S. Dist. Ct. (E.D. N.
 20 Car.), Case No. 5:13-CV-455-BO (the “North Carolina Federal Action”) and is currently
 21 pending. *Id.* As is shown by the notice of removal in the North Carolina Federal Action, Mr.
 22 Collard is represented in that case by Mr. Philip Layfield, who also represents IT Convergence in
 23 this action. Because the North Carolina Federal Action and this action are so closely related in
 24 that they both concern the central question of whether Mr. Collard’s continued employment with
 25 IT Convergence is lawful.

26 **B. ARGUMENT**

27 **1. The Standard for Rule 12(c)**

28 Rule 12(c) provides that a party may move for judgment on the pleadings at any time

1 after the pleadings are closed, but early enough not to delay trial. The Ninth Circuit has adopted
 2 the same standard for both Rule 12(c) motions and Rule 12(b)(6) motions to dismiss. *Dworkin v.*
 3 *Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (“Because the motions are
 4 functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to
 5 its Rule 12(c) analog”). A Rule 12(c) motion “is properly granted when, taking all the
 6 allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.”
 7 *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998).

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency
 9 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Pursuant to this rule, a court
 10 must grant a motion to dismiss when a plaintiff fails to state a claim upon which relief can be
 11 granted. This is evident when a plaintiff fails to plead facts sufficient to establish any essential
 12 element of a cause of action, *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.
 13 1984), or when the facts as pled preclude the claim based on “a dispositive issue of law.” *Neitzke*
 14 *v. Williams*, 490 U.S. 319, 326 (1989).

15 2. **This Later-Filed Action, Which Duplicates the North Carolina Action,
 16 Should be Dismissed or Stayed.**

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 18 A district court may exercise its discretion to dismiss a duplicative, later-filed action, or to
 19 stay that action pending resolution of the previously filed action. *Adams v. California Dept. of*
 20 *Health Services*, 487 F.3d 684, 688 (9th Cir. 2007); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th
 21 Cir. 1985) (a district court may dismiss later-filed duplicative actions regardless of whether they
 22 are pending in the same or different districts). A party has “no right to maintain two separate
 23 actions involving the same subject matter at the same time in the same court and against the same
 24 defendant.” *Adams*, 487 F.3d at 688 (quoting *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir.
 25 1977) (en banc)). “A suit is duplicative if the claims, parties, and available relief do not
 26 significantly differ between the two actions.” *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1145 (E.D.
 27 Cal. 1999). Duplicate complaints such as the instant case serve no proper purpose and can be
 28 dismissed outright. See *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 328 (9th Cir.

1 1995) (dismissing duplicative claims is meant “to protect the defendant from being harassed by
 2 repetitive actions based on the same claim.”); *Peak v. Green Tree Fin. Servicing Corp.*, No. C00-
 3 0953, 2000 WL 973685 (N.D. Cal. July 7, 2000) (dismissing purported class action that asserted
 4 identical claims and sought identical relief as pending first-filed action, notwithstanding different
 5 named plaintiffs). The need for the “conservation of judicial resources and comprehensive
 6 disposition of litigation” counsels against duplicative litigation, and district courts are given “an
 7 ample degree of discretion” to decline jurisdiction over duplicative lawsuits. *See e.g. Pacesetter*
 8 *Sys., Inc. v. Medtronic, Inc.* 678 F.2d 93, 95 (9th Cir. 1982) (quoting *Kerotest Mfg. Co. v. C-O-*
 9 *Two Fire Equip. Co.*, 342 U.S. 180 (1952)) (holding that when a complaint involves the “same
 10 parties and issues,” a district court can decline jurisdiction in favor of the first filed action).

11 The Ninth Circuit applies a “transaction test” to determine whether a subsequent action
 12 should be dismissed as duplicative of an earlier action. *Adams*, 487 F.3d at 689. The “most
 13 important” factor for the Court to consider in applying the transaction test is whether the suits
 14 arise out of the same common nucleus of facts. *Id.* (quoting *Costantini v. Trans World Airlines*,
 15 681 F.2d 1199, 1201-02 (9th Cir. 1982)). The lawsuits need not be identical for one to be
 16 dismissed; dismissal is appropriate even if the two suits are only “substantially similar.” *Nakash*
 17 *v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). Thus, the Ninth Circuit has affirmed
 18 dismissals where complaints were far from identical. *See Adams*, 487 F.3d at 689 (dismissal
 19 despite addition of different defendants and different legal claims); *Mpoyo v. Litton Electron-*
 20 *Optical Sys.*, 430 F.3d 985, 987-88 (9th Cir. 2005) (second lawsuit involved “distinct”
 21 evidence).¹

22 The Court, in its discretion, may also stay a duplicative case to promote the interests of
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24 ¹ Other circuits provide additional authority to dismiss duplicative actions. *See, e.g., Zerilli v. Evening*

25 *News Ass'n*, 628 F.2d 217, 222 (C. A. D. C. 1980) (dismissing claims against a defendant where the

26 count was the same as one already before the court); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985)

27 (affirming dismissal of duplicative suit in the same district holding that “[w]hen a plaintiff files a second

28 complaint alleging the same cause of action as a prior, *pending*, related action, the second complaint may

be dismissed”) (emphasis in original); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849,

851 (1st Cir. 1947) (“There is no reason why a court should be bothered or a litigant harassed with

duplicating lawsuits on the same docket.”).

1 docket control, efficiency, and fairness. *Landis v. North American Co.*, 299 U.S. 248, 254-55
 2 (1936); *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 820 (9th Cir. 1975); *Filtrol Corp. v.*
 3 *Kelleher*, 467 F.2d 242 (9th Cir. 1972).

4 As is more fully set forth in Section A above, the allegations in the earlier-filed North
 5 Carolina Federal Action establish that it shares the same core issues, namely, whether Mr.
 6 Collard's non-competition agreement with Moonracer is enforceable, and whether Mr. Collard's
 7 subsequent employment with IT Convergence violates that agreement. As such, *both actions*
 8 would involve the same or substantially similar parties, *both actions* would be based on the same
 9 or similar claims, *both actions* would arise from the same or substantially similar factual issues,
 10 and *both actions* would involve the same or substantially the same witness testimony and other
 11 evidence. Therefore, this case should be dismissed to avoid the inevitable duplicative discovery,
 12 motion procedures, and trial proceedings that would accompany parallel litigation, as well as the
 13 risk of inconsistent results. However, if the Court does not dismiss this case, at a minimum it
 14 should order a Stay pending the outcome of the North Carolina Federal Action (or, if it is
 15 remanded, the North Carolina State Action), to avoid the substantial and unnecessary duplication
 16 of judicial resources and resources of the parties.

17 **C. CONCLUSION**

18 For the reasons set forth above, Moonracer respectfully requests that this action be
 19 dismissed, with prejudice. Alternatively, this case should stay pending resolution of the North
 20 Carolina Federal Action (or, if remanded, the North Carolina State Action).

21 DATED: October 15, 2013

OGLETREE, DEAKINS, NASH, SMOAK &
 STEWART, P.C.

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By: /s/ Christopher M. Ahearn
 Douglas J. Farmer
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